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9 Five Pawns, Inc.

10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA

12
13 DUANE ROBERT GREENE, SHAWN
14 RANDALL THOMAS and JAMES
15 HIRTZEL, on behalf of themselves and
16 all others similarly situated,

17 Plaintiffs,

18 v.
19 FIVE PAWNS, INC.

20 Defendant

21 Case No. 8:15-cv-01859-DOC-DFM

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**DEFENDANT FIVE PAWNS, INC.'S
NOTICE OF MOTION TO DISMISS
FIRST AMENDED COMPLAINT**

Date: March 21, 2016
Time: 8:30 a.m.
Courtroom: 9D
Judge: Hon. David O. Carter

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT on March 21, 2016 at 8:30 a.m., or as soon
3 thereafter as counsel may be heard in Courtroom 9D of the above-entitled Court
4 located at 411 West Fourth Street, Santa Ana, California 92701, Defendant Five
5 Pawns, Inc. (“Five Pawns”) will and hereby does move this Court for an order
6 dismissing the First Amended Complaint (“FAC”), and each claim contained
7 therein, filed by plaintiffs Duane Robert Greene, Shawn Randall Thomas, James
8 Hirtzel, Anthony Swetala, and Dr. Sprague Simonds on behalf of themselves and all
9 others similarly situated (collectively, “Plaintiffs”).

10 This Motion is made pursuant to Rules 9(b), 12(b)(1), 12(b)(6), and 12(b)(e)
11 of the Federal Rules of Civil Procedure (“FRCP”), and is based on the following
12 grounds:

- 13 ▪ Plaintiffs lack Article III standing to pursue their claims because, by failing to
14 allege which, if any, of the alleged deceptive material, they saw or heard,
15 before making their purchases, and what disclosures they relied upon or what
16 omissions they would have relied upon had disclosure been made, Plaintiffs
17 have not alleged a causal connection between their alleged injuries and Five
18 Pawns’ alleged deceptive conduct.
- 19 ▪ Plaintiffs lack Article III standing to pursue their claims for injunctive relief
20 because they allege they are aware of Five Pawns’ alleged deceptive conduct
21 and do not allege that they intend to purchase Five Pawns’ products in the
22 immediate future.
- 23 ▪ The FAC is subject to Rule 9(b)’s heightened pleading standards and because
24 Plaintiffs fail to allege actual reliance (required for statutory standing under
25 the California and Indiana consumer protection statutes) and causation, for the
26 reasons described above, or the other circumstances of fraud, including when
27 certain alleged misrepresentations were made, with particularity, the FAC
28 must be dismissed.

- 1 ▪ Plaintiffs' claims based on omissions fail, as a matter of law, because Five
2 Pawns owes no duty under the law to make disclosures concerning the
3 presence of diacetyl ("DA") and acetyl propionyl ("AP") in its products, nor
4 have Plaintiffs alleged any misrepresentations were made to them contrary to
5 such alleged omissions.
- 6 ▪ Plaintiffs' claims based on Five Pawns' affirmative statements fail, as a
7 matter of law, because any such statements do not make a specific and
8 measureable claim, capable of being proved false or of being reasonably
9 interpreted as a statement of objective fact.
- 10 ▪ Plaintiffs' claims fail, as a matter of law, because Plaintiffs have not alleged
11 conduct that would be "likely to deceive" the reasonable consumer.
- 12 ▪ Plaintiffs' express warranty claim fails, as a matter of law, because Plaintiffs
13 do not allege that they provided pre-litigation notice of the claim nor do they
14 allege any of the elements of the claim with the requisite specificity.
- 15 ▪ Plaintiffs' claims for disgorgement of profits fail, as a matter of law, because
16 disgorgement of profits is not an available remedy under any of the claims
17 asserted in the FAC.
- 18 ▪ A more definite statement under FRCP 12(e) is appropriate if any claims
19 remain because the unclear mass of allegations makes it difficult for Five
20 Pawns to make informed responses to Plaintiffs' allegations.

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22 This Motion is based upon this Notice of Motion and Motion, the
23 concurrently filed Memorandum of Points and Authorities, and all pleadings and
24 papers on file in this action and upon such other matters and arguments as may be
25 presented to the Court prior to and at the time of the hearing.

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1 This Motion is made following the conference of counsel pursuant to Local
2 Rule 7-3, which took place on January 5, 2016.

4 | DATED: January 12, 2016

GARCIA RAINY BLANK & BOWERBANK LLP

By /s/ John E. Bowerbank

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